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BRIEF AND APPENDIX FOR APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
AUG 20 1957
Joseph W. Stewart
CLERK

No. 13,881

JOSEPH S. CHINN,

Appellant

v.

IDA V. CHINN,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EVERETT L. EDMOND
1510 - 9th Street, N.W.
Washington, D.C.
Counsel for Appellant

## STATEMENT OF QUESTIONS PRESENTED

The Court below erred as follows:

1. In awarding the appellee an absolute divorce on the ground of five years voluntary separation.

2. In decreeing a conveyance of appellant's joint interest in premises 209-44th Street, N. E., to appellee and their adopted daughter.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

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No. 13,881

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JOSEPH S. CHINN,

Appellant

v.

IDA V. CHINN,

Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# BRIEF FOR THE APPELLANT

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## JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1291, to review the rulings of the District Court below in this action begun by filing a complaint for absolute divorce. That court entered a final judgment, from which this appeal is taken. It had jurisdiction under Section 16-403 of the District of Columbia Code (1951 Ed.).

## STATEMENT OF THE CASE

This is an appeal taken by appellant to reverse a judgment of the District Court entered on December 3, 1956, granting appellee an absolute divorce on the ground of five years voluntary separation. One previous attempt to obtain a limited divorce from the appellant on the ground of cruelty was dismissed by the District Court after a full hearing in Civil Action No. 251-53, by final judgment of the court below entered April 15, 1954.

In the complaint for limited divorce the appellee alleged in paragraph four thereof as follows:

> "Plaintiff and defendant lived and cohabited together as husband and wife until January 15, 1951, when they separated by reason of cruel and abusive treatment exhibited by the defendant (appellant) upon the plaintiff (appellee), consisting largely of arguments, accusations without justification, causing plaintiff (appellee) to be nervous, the conduct of the defendant (appellant) has destroyed the marital relationship herein and plaintiff (appellee) alleges that she can no longer live and cohabit with defendant (appellant) without prejudice to her health." (R. 1) (Appellant's App. 1)

Appellant's answer to the foregoing paragraph four of the complaint for limited divorce was a denial of the allegations and the affirmative allegation by appellant of cohabitation between the parties subsequent to the filing of the said complaint for limited divorce. In its dismissal of the complaint for limited divorce the lower court decreed that the 'he appellant had not treated the appellee cruelly, and that the appel'ant had supported the appellee and their adopted child to the best of his ability. The lower court then concluded that the appellee was not entitled to any relief. The final judgment, therefore, in Civil Action No. 251-53, was in favor of the appellant which included the issue of cohabitation and cruelty as of April 15, 1954.

Likewise in paragraph four of appellee's complaint for absolute divorce on the ground of 5 years voluntary separation, which is the subject of this appeal, the appellee alleged as follows:

> "That while the plaintiff (appellee) and defendant (appellant) have been living in the same house they have not cohabited together for more than five years. The defendant (appellant) has been so cruel and abusive to plaintiff (appellee), and has so harassed and embarrassed her until, that since January 15, 1951, she has had no marital relations with him, that since said date they have lived completely separate and apart notwithstanding at the same address."

That appellant owned premises 209 - 44th Street, N. E., and 25 - 45th Street, N. E., and he took title to said properties in the name of appellee and himself as tenants by the entirety.

That the order of the lower court dated December 3, 1956 (R. 11) (Appellant's App. 9), in addition to awarding appellee an absolute divorce on the ground of 5 years voluntary separation, also awarded premises 209 - 44th Street, N. E., to appellee and Carol Chinn, as joint tenants, and awarded premises 25 - 45th Street, N. E., to appellant. Appellee was also awarded custody of their adopted child and $15.00 per month for the support of said minor. It is because of the grievances growing out of the foregoing that appellant prosecutes this appeal.

## STATUTE INVOLVED

Title 16, Section 403, District of Columbia Code, 1951 Edition, which provides:

> "A divorce from the bond of marriage . . . may be granted for . . . voluntary separation from bed and board for five consecutive years without cohabitation . . . ."

## SUMMARY OF ARGUMENT

1. This court has consistently held that a separation between spouses must be agreed upon as to both parties before it can be deemed voluntary within the meaning of the statute in question. If such agreement be absent initially as to one party, it is the duty of the party who is contending that a change has occurred in the character of the separation - e.g., from involuntary to voluntary - has the burden of proving that contention, and if she offers no evidence of a change of mind in the unwilling party, the law presumes that there was no change.

Since the final judgment entered by Judge Letts in the court below on April 15th, 1954, conclusively shows that appellant did not treat appellee cruelly, and since appellee did not allege in Civil Action No. 251-53, that the separation was voluntary, then it follows as a legal consequence that appellee's separation was one of desertion, which is wholly irreconcilable with voluntary separation.

2. The court erroneously disposed of the joint real estate owned by the parties: The parties owned two pieces of real estate, one of the value of $18,000.00, while the other was of the value of $6,500.00. The lower court awarded the property valued at $18,000.00 and unencumbered to appellee and the minor child jointly, and awarded the $6,500.00 real estate encumbered to the extent of $1,000.00, to the appellant. Appellant takes the position that there is nothing in the record which justifies such distribution of their real estate and consequently the lower court was without jurisdiction to make such a disposition.

## ARGUMENT

### I.

### MAY CRUELTY AND VOLUNTARY SEPARATION CO-EXIST AS GROUNDS FOR DIVORCE?

Appellant conceives the issue to be: Whether a wife who has grounded her suit for limited divorce on the issue of cruelty and having alleged in that suit that her separation from the husband is due to cruelty, and whose suit was dismissed by the trial court, may in her suit for absolute divorce on the ground of 5 years voluntary, use January 15, 1951, as the commencement date common to both suits.

To state the question tersely, can cruelty be made the basis of 5 years voluntary separation?

An analysis of the decisions of this court reveals the following principles of law relating to "voluntariness" within the meaning of Title 16, Section 403 of the D.C. Code: Before a divorce is authorized under the statute, the separation must have been voluntary on the part of both husband and wife or acquiesced in by them. In Dorsey v. Dorsey, 94 F. Supp. 917, affirmed 90 U.S. App. D.C. 284, 195 F.2d 567, the court said that the statute authorizing divorce for voluntary separation for 5 consecutive years requires a physical separation plus a mental disposition which gives a voluntary character of separation. This court has expressed itself on many phases of this question in the following cases:

Roberts v. Roberts, 95 U.S. App. D.C. 382, 222 F.2d 408, (1955);
Uline v. Uline, 92 U.S. App. D.C. 281, 205 F.2d 870 (1953);
Hawkins v. Hawkins, 89 U.S. App. D.C. 147, 191 F.2d 334 (1951);
Coci v. Coci, 88 U.S. App. D.C. 43, 188 F.2d 898 (1950);
Martin v. Martin, 82 U.S. App. D.C. 40, 160 F.2d 20 (1947);
Bufford v. Bufford, 81 U.S. App. D.C. 169, 156 F.2d 567 (1946);

Butler v. Butler, 81 U.S. App. D.C. 26, 154 F.2d 203 (1946); Boyce v. Boyce, 80 U.S. App. D.C. 355, 153 F.2d 229 (1946); Bowers v. Bowers, 79 U.S. App. D.C. 146, 143 F.2d 158 (1944); Parks v. Parks, 73 U.S. App. D.C. 93, 116 F.2d 556 (1940).

The word voluntary connotes agreement, i.e., both parties must have agreed to live apart. Martin v. Martin, supra. It is not sufficient that the separation is voluntary in the beginning, it must be voluntary for the entire statutory period. Bowers v. Bowers, supra. Though initially voluntary, divorce is not authorized if the separation thereafter ceases to be voluntary within the five-year period. See Martin v. Martin, supra; Bowers v. Bowers, supra. On the other hand even though the separation is involuntary in its inception, divorce is authorized if it thereafter becomes voluntary and continues so for the statutory period. Boyce v. Boyce, supra; Parks v. Parks, supra. Though one party does not agree to the separation in the beginning, that separation will become voluntary as to him also if he thereafter silently acquiesces.

The acquiescence constitutes agreement and the court will award the divorce. Bufford v. Bufford, supra; Boyce v. Boyce, supra; Bowers v. Bowers, supra; Parks v. Parks, supra. Where one party originally is agreeable so that the separation is initially voluntary as to him, but he later changes his mind and makes an attempt to reconcile within the statutory period, the separation then becomes involuntary and divorce is precluded. Cf. Martin v. Martin, supra; Boyce v. Boyce, supra; Bowers v. Bowers, supra. Conversely, a divorce may not be granted where one party does not initially agree to separate and, after the separation, makes efforts to bring about a reconciliation. Martin v. Martin, supra. In the instant appeal the appellee alleged in her complaint for limited divorce, C.A. No. 251-53, that she separated herself from the appellant and withheld cohabitation from him because of his cruelty. She alleges that January 15, 1951, was the date of her separation. On April 15, 1954, Judge Letts found as a fact and included said findings in

his final judgment, that the appellant had not treated the appellee cruelly and that appellant had supported appellee and their adopted daughter to the best of his ability. The judgment therefore is res judicata on the issues of cruelty and non-support as of April 15, 1954. The further effect of this judgment entered by Judge Letts is that the separation of the appellee was not due to cruelty, that it was not due to voluntary separation, but was due to the desertion of the appellee. If the appellee drove the appellant from his cohabitation with her for a cause that the judgment of the lower court determined did not exist, then the appellee is a constructive deserter. Under such circumstances the voluntary separation did not and could not arise. It was therefore incumbent upon the appellee to have shown in Civil Action No. 804-56, when and how her claim of voluntary separation arose, especially in the light of Judge Letts' entry of judgment under date of April 15, 1954. Once it is established that the separation was originally unilateral, the law presumes that it continues to be of that nature (Bufford v. Bufford, supra); and the party who contends that its character thereafter changed has the burden of proving the change. Bowers v. Bowers, supra.

In the case of Pratt v. Pratt, 99 U.S. App. D.C. 401, 240 F. 2d 639 (1957), this court held, that desertion and voluntary separation cannot exist at the same time. When tested in the light of the above principles of law enunciated by this court the conclusion seems inescapable that the separation in this case has at no time been voluntary on the part of the appellant and that the evidence on the part of the appellee was insufficient in law to entitle her to a divorce. That this is especially true where appellee makes cruelty the motivating cause of her separation in both Civil Actions Nos. 251-53 and 804-56. Under the foregoing circumstances the appellee having taken the position in Civil Action No. 251-53, that the separation was caused by cruelty, a ground normally supporting or justifying desertion, she is estopped by the record on this appeal from saying, in a subsequent suit covering the same period initially, that the separation was due to voluntariness on the part of both spouses.

## II.

## THE DISTRICT COURT IS WITHOUT POWER TO AWARD HUSBAND'S JOINT INTEREST IN REAL PROPERTY TO HIS ADOPTED DAUGHTER

Historically, of course, divorce and its problems, like marriage, was a function of the church. With the common law, our law of divorce inherited from the ecclesiastical courts of England to which an absolute divorce was unknown. Alexander v. Alexander, 13 U.S. App. D.C. 344, 345 (1898). Under the ecclesiastical law, a divorce from bed and board carried with it the power to award alimony but only on the basis of a continuing obligation of the husband to the wife accruing with the passage of time. Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (1913). By statute the ecclesiastical concept of divorce has now been universally enlarged in the Anglo-Saxon world. Additional to what we now commonly refer to as a limited divorce or legal separation - that inherited from ecclesiastical law - there now exists the absolute divorce which, being a creature of statute, is subject to its terms, grants and limitations. Alexander v. Alexander, supra; Holmes v. Holmes, 81 U.S. App. D.C. 132, 133, 156 F. 2d 737 (1946).

In expanding the ecclesiastical concept of divorce and engrafting their own provisions for support and settlement of property interest, the States adopted a wide variety of patterns. In general however, it is important to note that some - like the Congress in legislating for the District of Columbia - continued in the ecclesiastical tradition that alimony as such as distinguished from severance of property interest, was a continuing obligation of support accruing with the evolution of time, while other States losing sight of the origin and theory of alimony, or misusing the term, intergrated support and division of property provisions. Only in the latter jurisdiction of which the District of Columbia is not one - is real property of a spouse awarded to compensate for alimony augmentation.

In Bishop on marriage and divorce, Volume 2, Section 835, P. 339, it is stated:

> "The court cannot decree to the wife, as alimony, gross sum, an absolute title in specific property or a sale of a part of the husband's estate for her use."

It is significantly noted that the lower court gave to appellee and the adopted daughter, premises 209 - 44th Street, N. E. as joint tenants, and awarded appellant premises 25 - 45th Street, N. E. The former real property is of the value of $18,000.00, while the latter real property is valued at $6,500.00 inclusive of $1,000.00 encumberance. It is apparent that the aggregate value of the joint real estate owned by the parties was $23,500.00 and the equitable distribution thereof required a moiety of $11,750.00 each or its equivalent. Notwithstanding the equitable requirements the lower court's award resulted in the appellee and the adopted child receiving the $18,000.00 home and the appellant the $6,500.00 home subject to an encumberance of $1,000.00.

The adopted child is merely a prospective heir of the appellant with no interest whatever in appellant's property and the lower court was without jurisdiction to decree such a conveyance. Wheeler v. Wheeler, 88 U.S. App. D.C. 193, 188 F.2d 31 (1951); Keleher v. Keleher, 89 U.S. App. D.C. 266, 192 F.2d 601 (1952), cert. denied 343 U.S. 943; Cf. Slaughter v. Slaughter, 83 U.S. App. D.C. 301, 171 F.2d 129; Oxley v. Oxley, 159 F.2d 10, 81 U.S. App. D.C. 346 (1947).

Since this court has held that the husband's real estate may not be conveyed to the wife in furtherance of alimony security, it therefore follows as a matter of law that the father's real estate may not be appropriated in augmentation of his adopted daughter's maintenance.

## CONCLUSION

That by reason of the force of the decisions cited above together with the admitted facts in the instant case, the appellant respectfully urges this court to reverse and remand this cause.

Respectfully submitted,

EVERETT L. EDMOND

1510 - 9th Street, N.W.
Washington, D.C.

Counsel for Appellant

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# APPENDIX FOR APPELLANT

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

1 [Filed Jan. 19, 1953]

IDA V. CHINN
209 - 44th Street, N. E.
Washington, D. C.

Plaintiff,

-vs-

JOSEPH S. CHINN
209 - 44th Street, N. E.
Washington, D. C.

Defendant.

Civil Action No. 251-53

## COMPLAINT FOR LEGAL SEPARATION AND DIVISION OF PROPERTY RIGHTS

1. Plaintiff, IDA V. CHINN, an adult citizen of the United States, and resident of the District of Columbia, for more than two years next preceding the filing of this complaint, sues the defendant, JOSEPH S. CHINN, also an adult citizen of the United States, and resident of the District of Columbia in his own right, for relief as provided in Title 16, Sections 403, 410 and 415 of the Code of Laws for the District of Columbia.

2. Plaintiff and defendant were lawfully intermarried August 30, 1940, at Marlboro, Maryland; that there is one child of this marriage, CAROL CHINN, age 6 years.

3. During the married life of plaintiff and defendant, your plaintiff has done everything in her power for the comfort and welfare of defendant, his home and family, but notwithstanding said disposition of plaintiff as aforesaid, defendant committed the grievances hereinafter related.

4. Plaintiff and defendant lived and cohabited together as husband and wife until on or about January 15, 1951, when they separated by reason of cruel and abusive treatment exhibited by defendant upon the plaintiff,

consisting largely of arguments, accusations without justification, causing plaintiff to be nervous; the conduct of defendant has destroyed the marital relationship herein and plaintiff avers she can no longer live and cohabit with defendant without prejudice to her health.

5. There are property rights to be adjudicated in premises 209 - 44th Street, N.E. and 25 - 45th Street, N.E., both in the District of Columbia, and property located at Greenway Beach, Maryland; also in furniture and a Packard automobile, 1949 model.

WHEREFORE, the premises considered, plaintiff prays:

1. That process issue herein against defendant.

2. That plaintiff be awarded custody of the minor child, with an allowance for her support and that of the minor child pendente lite and permanently.

3. That plaintiff be awarded a judgment of limited divorce.

4. That plaintiff be awarded an allowance of counsel fees and costs.

5. For such other and further relief in the premises as to the Court shall be deemed meet and proper.

/s/ JOHN J. O'BRIEN
Attorney for Plaintiff

/s/ IDA V. CHINN
Plaintiff

* * *

DISTRICT OF COLUMBIA, SS:

IDA V. CHINN, being first duly sworn on oath deposes and says that she is the person named as plaintiff above; that she has read the foregoing complaint by her subscribed, and that she knows the contents thereof; that the matters and things therein related are true to the best of her knowledge and belief.

/s/ IDA V. CHINN

Subscribed and sworn to before me this 16th day of January, 1953.

/s/ (Illegible)
Notary Public, D.C.

3 [Filed Feb. 20, 1953]

ANSWER

First Defense

The Complaint fails to set forth a claim upon which relief may be granted.

Second Defense

1. Defendant admits the allegations of paragraph 1 of the Complaint except that he denies that the plaintiff is entitled to any relief under the quoted sections, or under any provisions of law.

2. Defendant admits the allegations of paragraph 2 of the Complaint except that he states that the child Carol Chinn is the adoptive daughter of the parties.

3. Defendant denies the allegations of paragraph 3 of the Complaint.

4. Defendant denies the allegations of paragraph 4 of the Complaint, and in further answer to said paragraph alleges that since their marriage as aforesaid to and including the date of the filing of the said Complaint plaintiff and defendant have lived and co-habited together in the District of Columbia.

5. Defendant denies the allegations of paragraph 5 of the Complaint.

Third Defense

The plaintiff is not a fit person to have custody of a minor child, and has, in addition, beaten and mistreated said child.

4

Fourth Defense

The defendant is at the present time supporting the plaintiff and said minor child, an adoptive child of the plaintiff and defendant.

Fifth Defense

Plaintiff is employed in the Medical Library at Howard University at a Salary of $2,750.00.

Sixth Defense

That any disagreements or unpleasantness which may have arisen between the plaintiff and defendant during their married life were caused by the actions of the plaintiff in failing to fulfill her obligations as the

wife of the defendant and, defendant is informed and believes, in consorting with one Dr. Mansfield of Howard University, now recently deceased.

Seventh Defense

Upon information and belief, defendant alleges that plaintiff is of unsound mind.

WHEREFORE, defendant prays that this Honorable Court will dismiss the plaintiff's action with prejudice, and will grant to the defendant such other and further relief as to the Court appears just and proper.

/s/ Jo V. Morgan, Jr.

* * *

Attorney for Defendant

(Certification of Service)

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5 [Filed April 15, 1954]

FINAL JUDGMENT

This cause having come on for final hearing, and the plaintiff having presented her evidence, and the defendant thereafter having moved pursuant to Federal Rule of Civil Procedure 41(b) for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief, and the Court finding that plaintiff and defendant were married August 30, 1940 in the State of Maryland and have an adopted minor child, Carol Chinn, and finding that the defendant has not treated the plaintiff cruelly, and has supported the plaintiff and the said minor child to the best of his ability, and the Court finding that the interest of the said minor child is best served if neither the plaintiff nor the defendant is granted exclusive custody, and the Court concluded as a matter of law that the plaintiff is not entitled to any relief, it is by the Court this 15th day of April, 1954,

ORDERED, ADJUDGED AND DECREED that final judgment be, and the same is hereby, granted in favor of the defendant and against the plaintiff dismissing the above entitled action with prejudice.

/s/ F. DICKINSON LETTS
Judge

(Certification of Service)

---

6 [Filed Feb. 23, 1956]

IDA CHINN
209 44th Street, N. E.
Washington, D.C.
Plaintiff

vs

JOSEPH S. CHINN
209 44th Street, N. E.
Washington, D.C.
Defendant

Civil Action No. 804-56

COMPLAINT FOR ABSOLUTE DIVORCE
(FIVE YEARS VOLUNTARY SEPARATION)

The plaintiff, Ida Chinn, represents to this Honorable Court as follows:

1. That she is a citizen of the United States and a resident of the District of Columbia and has been for more than two years next preceding the filing of this complaint.

2. That the defendant is a citizen of the United States and a resident of the District of Columbia and has been for more than two years next preceding the filing of this suit.

3. That the parties hereto were lawfully married August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the custody of the plaintiff.

4. That while the plaintiff and defendant have been living in the same house they have not cohabited together for more than five years;

the defendant has been so cruel and abusive to plaintiff and has so harassed and embarrassed her that since January 15, 1951 she has had no marital relations with him; that since said date they have lived completely separate and apart notwithstanding residence at the same address.

5. That the plaintiff and defendant jointly own property located at 25 45th Street, N. E.; valued at the approximate market value of $6,500 and property at 209 44th Street, N. E., valued at approximately $15,000.

6. That there is no collusion or connivance on the part of either party for the purpose of this action, nor is there any hope of reconciliation.

7 WHEREFORE, plaintiff demands:

1. Judgment against the defendant for divorce from the bonds of matrimony upon the ground of voluntary separation for over five years at the final hearing of this cause.

2. The plaintiff be given custody of the minor child of the parties.

3. That she be given an adequate amount of support for herself and said child, court costs and attorney fees.

4. That she be given her share of the jointly-owned property.

5. For such other and further relief as the nature of the case may require and to this Court may seem just and proper.

/s/ IDA V. CHINN

DISTRICT OF COLUMBIA, SS:

Ida Chinn, being first duly sworn on oath according to law deposes and says that she has read the foregoing complaint by her subscribed and knows the contents thereof; that the matters of fact therein are true and those matters stated upon information and belief she believes to be true.

/s/ IDA V. CHINN

Subscribed and sworn to before me this 27th day of January, 1956.

/s/ (Illegible)

Notary Public, D. C.

/s/ Belford V. Lawson, Jr., Atty. for Pltf.

8 [Filed Mar. 16, 1956]

ANSWER

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

1. Paragraph one of complaint is admitted.

2. Paragraph two of complaint is admitted.

3. Defendant admits the marriage as alleged, admits they have an adoptive child Carol Chinn and states that said child is in the care and control of both plaintiff and defendant, this Court having refused to grant exclusive custody of said child to plaintiff in the final decree in Civil Action No. 251-53, and denies the remaining allegations of paragraph three of the complaint.

4. Paragraph four of the complaint is denied.

5. Paragraph five of the complaint is admitted except that plaintiff does not have sufficient information to form a belief as to the allegations of market value.

6. Defendant admits there is no collusion or connivance, and denies the balance of paragraph six of the complaint.

Third Defense

1. On or about January 19, 1953, in the United States District Court for the District of Columbia, plaintiff in an action denominated Civil Action No. 251-53 filed a complaint for legal separation and property rights in which she sought a limited divorce and other relief.

9 2. In said action defendant was duly served with process and filed an answer.

3. In said complaint plaintiff alleged, and by said answer defendant denied separation on or about January 15, 1951, by reason of cruel and abusive treatment of plaintiff by defendant.

4. Said Civil Action came on for final trial before the Honorable F. Dickinson Letts, a Judge of this Honorable Court, both parties being present and the Court entered by a final judgment dated April 15, 1954,

finding, among others, that the defendant had not treated the plaintiff cruelly, and had supported the plaintiff and minor child to the best of his ability, and concluded as a matter of law that plaintiff was not entitled to any relief, thereupon entering final judgment in favor of defendant and against plaintiff dismissing said Civil Action No. 251-53 with prejudice.

Fourth Defense

The plaintiff is not a fit person to have custody of a minor child, and has beaten and mistreated said child.

/s/ JOSEPH S. CHINN
Defendant

/s/ Jo V. Morgan, Jr.

* * *

Attorney for Defendant

VERIFICATION

DISTRICT OF COLUMBIA, ss:

JOSEPH S. CHINN, first being duly sworn, on his oath says that he has read the foregoing answer by him subscribed and that the matters and facts therein stated are true to the best of his information, knowledge and belief.

/s/ JOSEPH S. CHINN

Subscribed and sworn to before me this 13th day of March, 1956.

/s/ Vera Simpson
Notary Public, D.C.

(Certification of Service)

11 [Filed Dec. 3, 1956]

JUDGMENT FOR ABSOLUTE DIVORCE

This cause coming on to be heard, upon the complaint and answer, the testimony taken in open Court, argument of counsel, and it appearing to the Court from consideration thereof that the plaintiff is a citizen of the United States and has been a resident of the District of Columbia for more than two years next preceding the filing of this action; that the plaintiff and defendant were married on August 30, 1940, in Upper Marlboro, Maryland; that the parties have one child, who is in the joint custody of the plaintiff and defendant; that the plaintiff and defendant voluntarily separated on January 15, 1951; said separation has been continuous without cohabitation to this day, it is by the Court this 3rd day of December, 1956,

ORDERED, ADJUDGED AND DECREED, that the plaintiff be and she is hereby granted an absolute divorce from the defendant on the ground of five years voluntary separation, continuously, and uninterrupted without cohabitation to the present date; provided that this judgment shall not become effective until the expiration of the time allowed for taking an appeal, nor until a final disposition of any such appeal, nor in any event until the expiration of six months from the date hereof.

12 It is further ORDERED, ADJUDGED AND DECREED, that the custody of the minor child of the parties hereto be awarded to the plaintiff and that the defendant pay to the plaintiff the sum of $15.00 a month for support of said child; said payments to be made on the first of each month beginning January 1, 1957; that the defendant is hereby given the right of visitation at reasonable times.

It is further ORDERED, ADJUDGED AND DECREED, that the property owned by the parties hereto, as tenants by the entireties, located at 209 44th Street, Northeast is hereby awarded and conveyed to the plaintiff and Carol Chinn, the minor child of the parties hereto as joint tenants and that the property owned by the parties as tenants by the entireties, located at 25 45th Street, Northeast, be and is

hereby awarded and conveyed to the defendant in fee simple. Plaintiff may not convey her interest in said property for six years without leave of Court.

/s/ Edward M. Curran
Judge

Seen:
/s/ Jo V. Morgan, Jr.
Attorney for Defendant.

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13 [Filed Dec. 12, 1956]

MOTION FOR JUDGMENT N.O.V., OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant, by his attorney of record, and moves the Court for a Judgment N.O.V., or in the alternative, a new trial, and as reasons therefor, states as follows:

1. That there was no competent evidence before the court upon which a finding on the ground of 5 years Voluntary Separation could be predicated.

2. That the judgment of this court in Civil Action No. 251-53, dated April 15th, 1954, precludes the issue of 5 years Voluntary Separation accruing prior thereto.

3. That the court was without jurisdiction to award defendant's real property to the plaintiff, where in the plaintiff furnishes no part of the consideration for its purchase.

4. That the court erred in awarding custody of the minor child to plaintiff.

5. That the complaint failed to allege any facts upon which the relief granted, can be supported.

6. That the substance of the relief sought and denied in Civil Action No. 251-53, is the same as the relief sought and granted in

the above-entitled cause.

7. That the relief granted by the entry of judgment herein was barred by the doctrine of res judicata.

14 8. That the judgment herein is vague and ambiguous.

9. And other sufficient reasons apparent upon the record of this court.

/s/ JAMES A. WASHINGTON, JR.

* * *

Attorney for the Defendant

(Certification of Service)

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18 [Filed March 15, 1957]

ORDER

The above cause coming on for hearing on January 11, 1957, and upon submission without argument by counsel of both parties and consideration by the Court it is this 15th day of March, 1957,

ORDERED, ADJUDGED AND DECREED, that the defendant's Motion for Judgment N.O.V. or in the alternative for a new trial be and the same is hereby denied.

/s/ EDWARD M. CURRAN

Judge

(Certificate of Service)

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19 [Filed March 22, 1957]

NOTICE OF APPEAL

Notice is hereby given this 22nd day of March, 1957, that the defendant, Joseph S. Chinn hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of March, 1957, in favor of plaintiff, Ida Chinn against said defendant, Joseph S. Chinn.

/s/ Everett L. Edmond
Attorney for defendant

Mail to Belford V. Lawson, Jr., Esq.
2001 - 11th St., N.W., Washington, D.C.

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20 [Filed April 26, 1957]

APPELLEE'S (PLAINTIFF'S) DESIGNATION OF RECORD

The Clerk of the United States District Court for the District of Columbia will please prepare for the record on appeal to the United States Court of Appeals for the District of Columbia in the above entitled cause the following:

1. Transcript of all testimony of all witnesses.
2. This designation of record.

/s/ Belford V. Lawson, Jr.
Attorney for Plaintiff

* * *

(Certificate of Service)

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21 [Filed April 27, 1957]

APPELLANT'S (DEFENDANT'S) DESIGNATION OF RECORD

The clerk of the United States District Court for the District of Columbia will please prepare on record on appeal to the United States Court of Appeals for the District of Columbia Circuit in the above entitled cause, and the following papers and proceedings, are hereby indicated for inclusion in said record on Appeal.

1. The complaint for absolute divorce.
2. The answer.
3. The complaint for limited divorce in civil action 251-53.
4. The answer filed in civil action 251-53.
5. The final judgment in civil action No. 251-53 dated April 14, 1954.
6. Final judgment granting absolute divorce in C.A. No. 804-56.
7. Motion for judgment N.O.V. or in alternative for new trial filed C.A. No. 804-56.
8. Order denying motion for judgment N.O.V. or in alternative for new trial, entered in C.A. No. 804-56.
9. Transcript of testimony of Ida V. Chinn and Joseph S. Chinn.
10. Notice of Appeal.
11. Appeal bond.
12. This designation of record.

/s/ Everett L. Edmond
Attorney for Defendant

(Certificate of Service)

Office - Supreme Court, U.S.
FILED
APR 15 1958
JOHN T. FEY, Clerk

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SUPREME COURT, U. S.

No. 926

**BRIEF FOR APPELLEE AND SUPPLEMENTAL APPENDIX**

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

United States Court of Appeals
For the
District of Columbia Circuit
FILED NOV 12 1957
Joseph W. Stewart
CLERK

No. 13,881

JOSEPH S. CHINN,

Appellant,

v.

IDA V. CHINN,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BELFORD V. LAWSON, Jr.
MARJORIE A. McKENZIE
2001 11th Street, N. W.
Washington, D. C.
Attorneys for Appellee

## QUESTIONS PRESENTED

Whether Appellee's earlier, unsuccessful suit for a limited divorce on the ground of cruelty is a bar to her subsequent suit for absolute divorce on the ground of five years voluntary separation, where, as here, the suits have a common separation date.

Whether the trial court erred in incorporating into the final decree of divorce a property agreement approved by the parties and their counsel, where such agreement provides for an interest to be conveyed to the minor child of the parties and provides further for only nominal support.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

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No. 13,881

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JOSEPH S. CHINN,

Appellant,

v.

IDA V. CHINN,

Appellee.

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APPEAL FROMTHE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# BRIEF FOR THE APPELLEE

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## COUNTER-STATEMENT OF THE CASE

Appellant seeks to reverse the judgment of the Court below, dated December 3, 1956, granting Appellee an absolute divorce on the ground of five years voluntary separation. On April 15, 1954, the United States District Court for the District of Columbia dismissed Appellee's suit against Appellant for a limited divorce on the ground of cruelty, which suit alleged that the parties had separated on January 15, 1951. On February 23, 1956, the Appellee filed a suit for absolute divorce on the ground of five years voluntary separation,

alleging the same date of separation, January 15, 1951. The Court below granted Appellee a judgment for absolute divorce and upon the consent and agreement of both parties and their counsel apportioned two parcels of real estate owned by Appellant and Appellee as tenants by the entireties. This agreement awarded one house to the Appellant as his sole property and the other to the Appellee and the minor child of the parties as joint tenants, with the proviso that Appellee may not convey her interest in the property without leave of Court. Appellee received no alimony award, but Appellant was ordered to pay $15.00 maintenance per month for the support of the child.

## SUMMARY OF ARGUMENT

1. Appellee's earlier suit for divorce on the ground of cruelty is not a bar to her later suit on the ground of five years voluntary separation, even though the separation date used in both suits is the same. The question to be considered is not the origin of the separation, but its continuing character. Where, as here, the spouse who opposes the divorce action, testifies again and again that he never asked for reconciliation, but only secretly wished for it, his conduct amounts to voluntariness under our statute. The fact that the parties lived under the same roof will not preclude the divorce, since there is ample evidence, by the parties and their witnesses, that they lived wholly separate lives.

2. The Court has jurisdiction under Title 16, Section 409, District of Columbia Code, 1951 Edition, to award or apportion the real property held by the parties as tenants by the entirety. The statute by its terms recognizes the validity of postnuptial property agreements.

The trial Court might have ordered premises 209 44th Street, N.E. conveyed to the wife on the basis of the evidence before it relating to her contributions to its purchase. Such power has been augmented

by the agreement of tthe parties and their counsel to provide for the security of the minorr child of the parties by way of conveying a joint interest to the child, along with the wife, and the agreement and settlement are propeerly included in the final decree of divorce. The transcript of the triaal reveals that an active role was taken in these arrangements by Apppellant's own lawyer and Appellant is estopped to deny his approval. Nothing in the record justifies Appellant's present contention ass to the value of one of the parcels of real property, nor the amount of thee encumbrance on the other, and Appellant's effort to introduce, on appeeal, material that was neither alleged nor proven, is prejudicial and improper.

## ARGUMENT

I. An Earllier, Unsuccessful Suit Based On One Groundl Of Divorce Is Not A Bar To A Subseqeuent Suit On Different Grounds, Despitee A Concurrence Of Time, Where, As Herre, Plaintiff Proves The Second Claim.

Appellee challeenges Appellant's conception of the issue, which he contends has arisen as the result of Appellee's two suits for divorce against him..

The real questtion is not, as Appellant claims, whether cruelty can be made the basiis of five years voluntary separation. Nor does Appellant's inconsisttent review of the cases, defining the requirements of voluntary separatiion, come to grips with the point he wishes to raise. That point has been disposed of by the record. Appellant, the Appellee, and two witnesses, Sexton and Robinson, testified in open Court that the separation was voluntary. Transcript of Trial, pp. 5, 6, 26, 30, 44, 45, 46, 47, 48, 49, 128, 129, 130, a circumstance conveniently overlooked by Appellant in the preparation of his brief.

The true issue is a narrow one. It is whether Appellee's earlier, unsuccessful suit for a limited divorce on the ground of cruelty is a bar to her subsequent suit for absolute divorce on the ground of five years voluntary separation, where, as here, the suits have a common separation date.

The factual situation that has emerged from the litigation herein sets this case apart, as is usual in domestic relations matters, from the precedents, and enables us to state the issue in even narrower terms. Appellee did not win her earlier suit because the Court found that Appellant did not treat Appellee cruelly. (Final Judgment, dated April 15, 1954, Civil Action No. 251-53). Is Appellee estopped, therefore, by reason of the unsustained allegations of her earlier claim, from stating another and different claim in a subsequent suit?

In the turmoil of emotions that surround the end of a marriage, the parties may view differently the subtle shadings of feelings that range from outrage to resignation,or of actions that range from abandonment to cruelty. A spouse is confronted with the reality of separateness. His or her ideas about how or why it occurred may vary in the course of an hour, a day, or a longer period. From a later and cooler vantage point, either may more readily recognize and accept the fact that the parting was arrived at by mutual accord, though the event or its causes was a cruel thing to be endured.

Accordingly, a claim of cruelty, when unproven, is not inconsistent with a later allegation, which is provable, that the parties separated voluntarily. Nor should the earlier claim operate as an estoppel against the later one when it does mature. The Federal Rules of Civil Procedure allow a party to set forth two or more statements of a claim or defense alternatively or hypothetically and also provide that a party may state as many separate claims or defenses as he has,regardless of consistency. Federal Rules of Civil Procedure, Rule 8 (e) (2), 28 U. S. C. A. This is the spirit

of justice. It has long been the rule in the District of Columbia, and still is, that admissions or recitals of facts made by a party in the pleading in another and different case are not held to be competent evidence. Nor is there any element of estoppel in such pleadings on the trial of another and wholly distinct case. Keyser v. Pickrell, 4 App. D. C. 198, 212 (1894).

In divorce litigation, the District of Columbia authorities appear to be divided as to whether an earlier suit, based upon one of the allowable grounds for divorce, bars a later suit on different grounds, when there is a concurrence of time in the two suits. Analysis reveals the results that have been reached in the cases to be consistent with and supportive of Appellee's position that the earlier suit is not a bar.

In Parks v. Parks, 73 U.S. App. D. C. 93, 116 F. 2d 556 (1940), the Court found no bar. In that case, the wife obtained a limited divorce on the ground of desertion in May, 1935. Three years later, in May, 1938, the husband sued for absolute divorce on the ground of five years voluntary separation. At that time, the parties had been separated for six consecutive years. The Court found that at first the separation was not voluntary, but that later it became so in the statutory sense, because of the wife's acquiescent conduct. The Court held that the wife's limited divorce did not prevent the husband from obtaining an absolute divorce on the ground of voluntary separation. The wife might have enlarged her limited divorce in May, 1937, but she did not, and the Court did not require the husband to wait five years from the date of her decree, or until May, 1940, to file his suit.

In Buford v. Buford, 81 U.S. App. D.C. 169, 156 F. 2d 567 (1946), the wife sued for limited divorce in 1939, immediately following the separation of the parties. She charged cruelty.

Her suit was denied. In 1941, the husband sued for absolute divorce on the ground of desertion. His suit was denied as well. In 1944, the husband sued again on the ground of five years voluntary separation. Following a judgment for the wife, he appealed and was sustained in his contention that it was error to dismiss his complaint. But neither of the earlier, unsuccessful suits was regarded by this Court as a bar to the husband's action.

The Buford decision provides further authority for guidance in the instant case. The trial court had found that the separation was not voluntary. The Court of Appeals found, on the contrary, that the wife had chosen to leave. It said, "If her choice was influenced by unkindness, or even cruelty (of which there is no evidence), on his part, that is immaterial under our statute. To say that there is provocation or justification for an act is not to say that the act is involuntary". [Emphasis supplied]

We have here a close parallel. The parties separated. Appellee charged Appellant with cruelty. She did not prove her case. The parties remained apart for more than five years prior to Appellee's second suit. We need not now examine the secret motivation for this course of conduct, but only the conduct itself to give it legal significance under our statute. For the statute does not require that the separation originate in any particular way, Parks v. Parks, supra.

Appellant has relied heavily on Pratt v. Pratt, 99 U.S. App. D.C. 401, 204 F. 2d 639 (1957), without clearly stating his reasons for such reliance. There are important factual differences between the Pratt case and the instant case. In Pratt v. Pratt, the husband filed for absolute divorce on the ground of five years voluntary separation, less than three months after the wife had obtained a limited divorce on the ground of desertion.

In the Pratt case, a valid decree was in effect, having been granted for a cause of action which matured less than five years prior

to the husband's suit. Hence, it is not an unsuccessful action which bars a subsequent claim, but an existing judgment which binds the parties.

Appellant cites Roberts v. Roberts, 95 U.S. App. D.C. 382, 222 F. 2d 408 (1955), but fails to relate its meaning to the issue he has raised inferentially. In Roberts v. Roberts, the husband filed three separate suits: The first was for a limited divorce on the ground of cruelty and was dismissed; the second and third were for absolute divorce on the ground of five years voluntary separation. In the second suit, the wife testified as to the involuntary nature of the separation. In the third, the husband testified as to the wife's numerous efforts at reconciliation. The trial court found that these efforts were in bad faith. The Court of Appeals held that the evidence gave rise to a presumption of good faith, based in part on the finding in the cruelty suit that the wife was eager and insistent, in good faith, to maintain the marriage. It is the finding of the wife's good faith in the early suit that precluded the husband's later suits, which could only succeed in the absence of such good faith. In its totality, the Roberts case turns on the voluntary nature of the separation. There is no doubt that the conscience of the Court was offended by the husband's cold and persistent campaign to get rid of his wife.

In the case before us, there was no finding that cruelty did exist. Moreover, the question of voluntariness is put to rest by Appellant's own testimony and conduct. See Appellant's long colloquy with the trial judge, Transcript of Trial, pp. 45 to 47.

The Roberts case has given us a definitive test of voluntariness under our statute. There must be affirmative agreement, silent acquiescence, or a showing in good faith of a desire to continue the marriage relation, Roberts v. Roberts, supra, p. 384. Under any aspect of this rule, Appellee must prevail, for the record, as quoted,

supra, shows again and again, that Appellant thought of reconciliation only "within his heart", but meanwhile told friends he was "through".

On the question of the voluntary nature of the separation, the findings of the trial court will not be disturbed unless clearly erroneous. Farish v. Farish, 87 U.S. App. D.C. 329, 185 F. 2d 425 (1950); Talbert v. Talbert, 96 U.S. App. D.C. 55, 223 F. 2d 347 (1955). It is the continuing character of the separation, not its origin or provocation that controls. Bowers v. Bowers, 79 App. D.C. 146, 143 F. 2d 158 (1944); Buford v. Buford, supra. The record clearly shows that Appellant and Appellee have lived their separate lives under the same roof. This will not preclude a legal termination to a marriage that has ceased to exist in fact. Hawkins v. Hawkins, 89 U.S. App. D.C. 147, 191 F. 2d 344 (1951); Boyce v. Boyce, 80 U.S. App. 355, 153 F. 2d 229 (1946).

## II. It Is Not An Abuse Of Discretion Or Power For The Court To Incorporate In The Decree Of Divorce An Equitable Property Settlement Agreed Upon By The Parties And Their Counsel.

The award of premises 209 44th Street, N. E., to Appellee and the minor child of the parties herein, as joint tenants, was arrived at by clear agreement, made in the trial judge's chambers and in open Court. Transcript,pp. 131, 146-8. The record clearly shows that Appellant's counsel agreed and reminded the Court of the agreement and suggested a method of conveyance. In her complaint for divorce, dated January 27, 1956, Civil Action No. 804-56, Appellee (Plaintiff below) prayed for support for herself and the said child, court costs and attorney's fees, her share of the jointly owned property and for such other relief as the case might require and the Court might deem proper.

Appellee and Appellant were tenants by the entireties of both premises 209 44th Street, N. E. and 25 45th Street, N. E. The judgment for absolute divorce, filed December 3, 1956, awarded premises 25 45th Street, N. E. to the Appellant as his sole property. In addition, premises 209 44th Street, N. E. was awarded to Appellee and the minor child of the parties as joint tenants and Appellee was restrained by the decree from disposing of her interest in the property for six years without leave of Court. Support for the minor child, payable by Appellant to Appellee, in the amount of $15.00 a month was ordered. No alimony was provided or secured to Appellee.

Appellant has suffered a second thought regarding the above-described disposition of interests and obligations, which disposition he formerly approved and now would lay at the door of the trial court as an abuse of discretion and power. An award of $15.00 a month as support for a child is without reason, except in a context of other agreed-upon adjustments and awards. Appellee asked for alimony, but received none. The record shows that she had materially and even equally contributed to the purchase of both pieces of property owned by the parties. Transcript, pp. 10, 11, 12, 40, 41, 54, 55, 56, 77, 93, 94, 95, 96, 98, 99. It was clearly within the power of the Court, under Title 16, Section 409, District of Columbia Code, to have awarded premises 209 44th Street, N. E. to Appellee as her sole property and Appellant could not now be heard to complain. That Appellee chose to provide for the security of the minor child by the settlement reached by the parties and reflected in the decree, rather than fashioned by it, resulted from a desire to put old contentions and bitterness to rest at last. Such might not be the case were Appellant under order to pay alimony and child support in realistic amounts. Appellant prefers to revive the fight rather than abide by his agreement. There is nothing in the transcript or elsewhere in the record to support the conclusions in Appellant's brief that premises 209 44th Street, N. E. is worth $18,000. The house cost $8,500 and was paid for by 1949.

Transcript, pp. 40, 100. Premises 25 45th Street, N. E. cost $6,500 in 1948 and only $200 was owed on it at the time of trial, Transcript, p. 147, not $1,000, as Appellant would say on this appeal.

That the parties may make valid post nuptial agreements and settlements regarding their jointly held property is unchallenged law in this jurisdiction, whether or not such settlement relates to a divorce action. It follows that such settlements may be incorporated in a decree of divorce. Heath v. Heath, 89 U.S. App. D.C. 68, 189 F. 2d 697 (1951).

## CONCLUSION

For the reasons stated herein, we submit that the court below committed no error, and that the rulings complained of by Appellant were proper, and that, accordingly, the decree and judgment appealed from should be affirmed.

Respectfully submitted,

BELFORD V. LAWSON, JR.

MARJORIE A. McKENZIE

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